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Nguang Chan aka Nguang Chan Liquor Trader & Ors v Hai-O Enterprise Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W- 02–541 OF 2001 AND W-02–542 OF 2001
ABDUL KADIR SULAIMAN, RICHARD MALANJUM AND TENGKU BAHARUDIN SHAH JJCA
5 JUNE 2009

Civil Procedure — Discovery — Inspection of documents — Whether order for production justified — Whether necessary for disposing matter fairly or for saving costs — Whether merely fishing for evidence — Whether order would be unduly oppressive — Whether mere reference by inference to a document in pleading or affidavit sufficient — Whether documents in possession, custody and power of opponent — Rules of the High Court 1980 O 24 r 13(1)

The appellants and the respondents had instituted separate civil suits against each other on various grounds such as passing off, defamation, malicious prosecution and unlawful interference with trade and business as responsible dealers of a particular brand of a Chinese medicinal wine ('the Chinese wine'). During trial, the respondents filed an application under O 24 r 11 of the Rules of the High Court 1980 ('RHC') requiring the appellants to produce for their inspection various documents evidencing the purchase and/or import of 1500 cartons of counterfeit Chinese wine ('the said documents') alleged to be in the appellants' possession. The application was grounded on the fact that the witness statement of the appellants' Ngan Meow Yiap ('Ngan') acknowledged the existence and/or made reference to the purchase/import of 1500 cartons of counterfeit Chinese wine. The respondents also filed another application under O 24 r 11 of the RHC seeking an order to produce for inspection, the appellants' purchase/import documents dated after April 1994 ('the import documents') relating to the same brand of the Chinese wine referred to in Ngan's affidavit. The learned trial judge ordered the production of the various documents for inspection and hence these appeals.

Held, allowing both appeals with costs:

(1) Under O 24 r 13(1) of the RHC, an order for the production of documents for inspection is not to be made unless the court is of opinion that such order is necessary either for disposing fairly of the

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case or matter or for saving costs. It is for the party seeking production to satisfy the court that such production is necessary for the purpose specified in r 13(1). The court would dismiss a plaintiff's application for discovery if the plaintiff is merely fishing for evidence to prop up his case and to allow him discovery would be unduly oppressive to the party giving discovery (see paras 11 & 13).

(2) There is no basis to equate an unsigned subject to approval draft witness statement with a pleading or affidavit filed in court. For the purpose of discovery, reference in such draft statement to any document cannot possibly give any right to the other party to production for inspection of the document so referred to therein. Even in the case of a pleading or affidavit the reference to any document therein must be by way of direct allusion to a document or class of documents sought for discovery and not if the reference arises merely by inference (see para 15).

(3) Ngan's witness statement did not make reference at all directly or otherwise to any document or transaction relating to the said documents to even suggest that the appellants were aware of their existence. There was therefore no basis for the respondents' belief that the appellants had at any time the said documents in their possession, custody or power. The exercise of the learned judge's discretion was based on the wrong premise that the appellants admitted having the said documents in their possession, custody and power. There was not a shred of evidence adduced to support that. The appellate intervention was accordingly justified (see paras 17–18).

(4) The test is necessity not fairness. The learned judge was erroneously more concerned with relevance and fairness and omitted to consider whether and why it was necessary for the order to be made. The respondents also failed to provide any materials to satisfy the court of such necessity (see para 25).

[Bahasa Malaysia summary

Perayu-perayu dan responden-responden telah memulakan guaman sivil yang berasingan terhadap satu sama lain atas pelbagai alasan seperti kelirupaan, fitnah, pendakwaan niat jahat dan gangguan yang menyalahi undang-undang dengan perniagaan dan dagangan sebagai peniaga yang bertanggungjawab dengan jenama khusus wain ubat Cina ('wain Cina'). Semasa perbicaraan, responden-responden memfailkan satu permohonan di bawah A 24 k 11 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') meminta perayu-perayu untuk mengemukakan pelbagai dokumen yang membuktikan pembelian dan/atau import 1500 karton-karton wain Cina tiruan untuk pemeriksaan mereka ('dokumen-dokumen tersebut') yang dikatakan berada dalam milikan

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perayu-perayu. Permohonan ini berasaskan fakta bahawa penyataan saksi perayu-perayu Ngan Meow Yiap ('Ngan') yang mengakui kewujudan dan/atau merujuk kepada pembelian/import 1500 karton-karton wain Cina tiruan tersebut. Responden-responden juga memfailkan permohonan lain di bawah A 24 k 11 KMT memohon satu perintah untuk mengemukakan untuk diperiksa, dokumen-dokumen pembelian/import perayu-perayu yang bertarikh selepas April 1994 ('dokumen-dokumen import') yang berkaitan dengan jenama wain Cina yang sama merujuk kepada afidavit Ngan. Hakim perbicaraan yang bijaksana mengarahkan dokumen-dokumen tersebut dikemukakan untuk diperiksa dan maka rayuan-rayuan ini.

Diputuskan, membenarkan kedua-dua rayuan dengan kos:

(1) Di bawah A 24 k 13(1) KMT, satu perintah untuk mengemukakan dokumen-dokumen untuk diperiksa tidak boleh dibuat melainkan mahkamah berpendapat bahawa perintah tersebut penting sama ada untuk memutuskan kes atau perkara tersebut secara adil atau untuk menjimatkan kos. Pihak yang memohon penemuan tersebut perlu memuaskan pihak mahkamah bahawa penemuan tersebut adalah penting sepertimana yang dinyatakan dalam k 13(1). Mahkamah akan menolak permohonan plaintif untuk penemuan sekiranya plaintif hanya memancing agar keterangan akan menyokong kesnya dan membenarkan penemuan yang akan menindas pihak yang memberikan penemuan secara terlampau (lihat perenggan 11 & 13).

(2) Tiada asas untuk menyamakan draf pernyataan saksi yang tidak bertandatangan yang tertakluk kepada kebenaran dengan pliding atau afidavit yang difailkan di mahkamah. Bagi tujuan penemuan, rujukan dalam draf penyataan kepada mana-mana dokumen tidak memberikan hak kepada pihak yang lain untuk mengemukakan dokumen untuk diperiksa dan dirujuk di dalamnya. Malah dalam kes pliding atau afidavit rujukan kepada mana-mana dokumen di dalamnya mestilah melalui sebutan secara langsung terhadap suatu dokumen atau jenis dokumen yang dipohon untuk penemuan dan bukannya apabila rujukan tersebut ditimbulkan melalui inferens (lihat perenggan 15).

(3) Penyataan saksi Ngan tidak merujuk secara langsung atau sebaliknya kepada mana-mana dokumen atau transaksi berkaitan dengan dokumen-dokumen berkenaan untuk menunjukkan bahawa perayu-perayu sedar akan kewujudan dokumen tersebut. Oleh itu tiada asas bagi pendapat responden bahawa perayu-perayu memiliki dokumen-dokumen tersebut dalam milikan, jagaan atau kuasa mereka pada setiap masa. Penggunaan kuasa budi bicara hakim yang bijaksana adalah pada premis yang salah bahawa perayu-perayu mengaku mempunyai dokumen-dokumen tersebut dalam milikan, jagaan dan

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kuasa mereka. Tiada sedikitpun keterangan yang dikemukakan untuk menyokongnya. Campur tangan rayuan adalah secara wajarnya dibenarkan (lihat perenggan 17–18).

(4) Ujian yang digunakan adalah keperluan bukannya keadilan. Hakim yang bijaksana khilaf dengan mementingkan kerelevanan dan keadilan dan terlupa untuk mempertimbangkan sama ada dan kenapa perintah tersebut penting untuk dikemukakan. Responden juga telah gagal untuk menyediakan sebarang material yang boleh memuaskan pihak mahkamah akan kepentingan tersebut (lihat perenggan 25).]

Notes

For cases on inspection of documents, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2488–2497.

Cases referred to

Dolling-Baker v Marrett & Ors [1991] All ER 890, CA (folld)
Dubai Bank Ltd v Galadari & Ors (No 2) [1990] All ER 738, CA (refd)
Leslie S Holmes v Engineering Service Inc [1993] 1 AMR 27, HC (refd)
Rafidain Bank v Agom Universal Sugar Trading Co Ltd [1987] 3 All ER 859, CA (refd)
Taylor v Anderton [1995] 1 WLR 447, CA (folld)
Ventouris v Mountain [1991] 1 WLR 607 (folld)

Legislation referred to

Rules of the High Court 1980 O 24 rr 10, 10(1), 11, 11(1), (2), 13, 13(1)
Rules of the Supreme Court [UK] O 24 rr 10, 11

Appeals from: Civil Suit Nos D1–22–400 of 1997 and D4–22–34 of 1995 (High Court, Kuala Lumpur).

Porres P Royan (Michael Soo with him) (Shook Lin & Bok) for the appellants.
Maidzuara Mohammad (Goh Keng Tat with her) (Logan Sabapathy & Co) for the respondents.

Tengku Baharudin Shah JCA:

[1] We heard these related appeals against the decision of the learned judge of the High Court ordering the production for inspection by the respondents of various documents alleged to be in the possession, custody or power of the appellants who were the defendants in the case being tried before him in the court below. We allowed both appeals and set aside orders of the learned

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judge allowing discovery in the midst of the trial which had already begun when the applications were made. We now state our reasons for so deciding.

BACKGROUND

[2] The first and third appellants instituted the KL High Court Civil Suit No D4–22–34 of 1995 ('the D4 action') against the first respondent claiming various reliefs for alleged defamation, malicious prosecution and unlawful interference with their trade and business as responsible dealers of a particular brand of a chinese medicinel wine ('the said Chinese wine'). Some two years later the respondents filed KL Civil Suit No D1–22–400 of 1997 ('the D1 action') against all the appellants for alleged passing off and infringement of the respondents proprietary rights by distributing and selling counterfeit said Chinese wine.

[3] On 5 August 1997 the D1 action was ordered to be tried together with the D4 action. However on 6 December 1999 the parties agreed to the mode of trial in which the parties in the D1 action would proceed with their respective claim and counterclaim and that the parties in the D4 action would be bound by the decision in the D1 action as well as any order as to costs made therein (see terms of the recorded agreement at p 271 of the AR 541).

[4] The trial commenced on 19 June 2000 through 22 June 2000 and was adjourned for continued hearing for three days in November 2000. Before the resumption of trial however the respondents on 14 September 2000 filed summons in chambers encl 40 in the D1 action ('encl 40') under O 24 r 11 of the Rules of the High Court 1980 ('RHC') requiring the appellants to produce for their inspection various documents evidencing the purchase and/or import of 1500 cartons of counterfeit said Chinese wine ('the said documents') alleged to be in the appellants' possession. The application was grounded on the fact that the witness statement of the appellants' Ngan Meow Yiap (Ngan) acknowledged the existence and/or made reference to the purchase/import of 1500 cartons of counterfeit said Chinese wine, that the appellants had failed to comply with the notice to produce the said documents dated 13 July 2000 and that the said documents are essential and relate to the issue in the action and are material to the respondents' claim. Enclosure 40 was twice adjourned at the instance of the respondents' solicitors.

[5] The respondents then on 9 February 2001 filed summons in chambers encl 61 in the D4 action ('encl 61') also under O 24 r 11 of the RHC seeking an order to produce for inspection of the respondents the appellants' purchase/import documents dated after April 1994 (the import documents)

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relating to the same brand of the Chinese wine referred to in Ngan's affidavit affirmed on 8 February 1995. The application was not supported by any affidavit. On the next hearing date of encl 40 the learned judge acceded to respondent counsel's request for encl 61 and another SIC for discovery to be heard together with encl 40 and determined as they were said to be related. He directed that written submissions be lodged by both parties. His Lordship subsequently on 23 April 2001 allowed all three applications with costs, hence these appeals before us against his decision on encls 40 and 61.

FINDING OF THE HIGH COURT

[6] The learned trial judge gave identical grounds of decision which are short and simple. He states that the respondent's cause of action against the appellants raises the main issue of whether the subject matter of the slander was counterfeit. Therefore the discovery and production of the documents sought are relevant to the issues in the case. He also holds that the production of the documents would enable the case to be disposed of fairly particularly so when the existence of those documents in the appellants possession, custody and power was admitted and confirmed by the appellants in the witness statements and the affidavits filed.

THE APPEALS

[7] Separate appeals were filed by the appellants the first appeal No W-02–541 of 2001 in respect of the order made on encl 40 while the second appeal No W-02–542 of 2001 is in respect of encl 61. Several grounds of appeal were put up in the memoranda of appeal filed but before us only one issue said to be common to both appeals was convassed. And that is that the learned trial judge erred in law and fact in holding that the appellants had admitted having in their possession, custody and power documents relating to the alleged importation of the counterfeit said Chinese wine from Kwong Ming Trading Co of Hong Kong.

THE LAW

[8] Both encls 40 and 61 are made under O 24 r 11 of the RHC. The applicable rules are rr 10, 11 and 13 which relevant provisions are reproduced for convenience of reference.

10 Inspection of documents referred to in pleadings and affidavits (O 24 r 10)

(1) Any party to a cause or matter shall be entitled at any time to serve a notice in Form 43 on any other party in whose pleadings or affidavits

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reference is made to any document requiring him to produce that document for the inspection of the party giving the notice and to permit him to take copies thereof.

(2) The party on whom a notice is served under paragraph (1) must, within 4 days after service of the notice, serve on the party giving the notice a notice in Form 44 stating a time within 7 days after the service thereof at which the documents, or such of them as he does not object to produce, may be inspected at a place specified in the notice, and stating which (if any) of the documents he objects to produce and on what grounds.

11 Order for production for inspection (O 24 r 11)

(1) If a party who is required by rule 9 to serve such a notice as is therein mentioned or who is served with a notice under rule 10(1):

(a) Fails to serve a notice under rule 9 or, as the case may be, rule 10(2) or then, subject to rule 13(1), the Court may, on the application of the party entitled to inspection, make an order in Form 45 for production of the documents in question for inspection at such time and place, and in such manner, as it thinks fit.

(2) Without prejudice to paragraph (1), but subject to rule 13(1) the Court may, on the application of any party to a cause or matter, order any other party to permit the party applying to inspect any documents in the possession, custody or power of that other party relating to any matter in question in the cause or matter.

(3) An application for an order under paragraph (2) must be supported by an affidavit specifying or describing the documents of which inspection is sought and stating the belief of the deponent that they are in the possession, custody or power of the other party and that they relate to a matter in question in the cause or matter.

13 Production to be ordered only if necessary, etc (O 24 r 13)

(1) No order for the production of any documents for inspection or to the Court shall be made under any of the foregoing rules unless the Court is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.

[9] In *Dubai Bank Ltd v Galadari & Ors (No 2)* [1990] 2 All ER 738 at p 744 the English Court of Appeal held that, the natural and ordinary meaning of the phrase 'reference to' imports the making of a direct allusion to a document or documents. The absence of a direct allusion to the document in the affidavit will mean that the other party will not have the right to such production and inspection under O 24 r 10 (which is in pari

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materia with our O 24 r 10 of the RHC). The court rejected the submission that 'reference' includes a 'reference by inference', that is, where an assertion made in an affidavit or pleading gives rise to an inference that the document must or might exist.

[10] In considering the equipollent English provision of r 11 the Court of Appeal in *Rafidain Bank v Agom Universal Sugar Trading Co Ltd* [1987] 3 All ER 859 held that the court has jurisdiction to order discovery of documents referred to in a party's pleadings and affidavits notwithstanding that the documents were not in the custody, possession or power of that party, but the absence of custody, possession or power could well amount to a good cause for the court to refuse to exercise its discretion. In that case Watkins LJ also made the following observation:

> I see no reason whatsoever why the broad scope of rr 10 and 11 should be restricted in any way subject of course to the exercise of the court's discretion. It is plain to me that the additional power given to the court in r 11(2) contains an exceptional restriction, namely that the making of an order is *dependant on whether the documents sought are in the possession, custody or power of the party* to whom the order if made is directed. (Emphasis added.)

[11] Under r 13(1) an order for the production of documents for inspection is not to be made unless the court is of opinion that such order is necessary either for disposing fairly of the case or matter or for saving costs. It is for the party seeking production to satisfy the court that such production is necessary for the purpose specified in r 13(1) per Parker LJ in *Dolling-Baker v Marrett & Ors* [1991] 2 All ER 890 and *Ventouris v Mountain* [1991] 1 WLR 607.

[12] And in considering the application the court should bear in mind the words of Sir Thomas Bingham MR in *Taylor v Anderton* [1995] 1 WLR 447 at p 462 that 'the purpose of the rule is to ensure that one party does not enjoy an advantage or suffer an unfair disadvantage in the litigation as the result of a document not being produced for inspection.'

[13] Finally the court would dismiss a plaintiff's application for discovery if it is of the view that the plaintiff was 'merely fishing for evidence to prop up his case' and to allow him discovery would be unduly oppressive to the party giving discovery — see *Leslie S Holmes v Engineering Service Inc* [1993] 1 AMR 27 at p 36.

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ENCLOSURE 40

[14] It was submitted on behalf of the appellants on the authority of *Rafidain*'s case that there was no reference to the said documents in Ngan's purported witness statement paras 74–78 on grounds that the said statement is not a pleading or affidavit within the meaning of r 10(1) and the alleged reference on the authority of the *Dubai Bank*'s case is not a direct allusion to the said documents, hence there is no evidence that the appellants have or had at any time custody, possession or power over them and the respondent's are on a fishing expedition. On the respondents behalf it was contended that encl 40 is made pursuant to r 11(2) and not r 10 of O 24 and that there is tacit acknowledgement by Ngan of the existence of the 1500 cartons of alleged counterfeit said Chinese wine.

[15] We found no basis to equate an unsigned subject to approval draft witness statement (therefore not yet a court document) with a pleading or affidavit filed in court. For the purpose of discovery, reference in such draft statement to any document cannot possibly give any right to the other party to production for inspection of the document so referred to therein. Only r 10 of O 24 gives the court jurisdiction to order production for inspection of documents referred in court documents. And even in the case of a pleading or affidavit the reference to any document therein must be by way of direct allusion to a document or class of documents sought for discovery and not if the reference arises merely by inference. The court is not clothed with jurisdiction to allow discovery if the reference is merely to a transaction which on the balance of probabilities must have been effected by a document — see Slade LJ in the *Dubai Bank*'s case.

[16] Let us look at Ngan's draft witness statement — paras 74–78 to see whether it contain any acknowledgement of the existence or any reference to the documents sought to be produced. It is reproduced for conveniece:

> 74 Now, turn to p. 292 BOD, what is the document?
>
> R: It is a letter from Wuhan Medicines & Health Products Import & Export Corporation to the Embassy of China.
>
> 75 What is the content of the said letter?
>
> R: On 24/12/94, our goodself has written to us to know about the export of 1500 cartons counterfeited Special Quality Lingzhi wine to Hong Kong Kwong Ming Trading Co. For your information, the formula of the wine is the formula given by Changyu Pioneer Wine Co's formulation guideline.
>
> 76 Please read the first sentence of parapraph 3 of the said letter.
>
> R: Referring to the invoice no. 0000849 covering 500 cartons of special quality Lingzhi wine, we are reaffirming that they are purchased from Changyu Pioneer Wine Co. …

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77 What do you gather from the said letter?

R: That Kwong Ming is telling the truth, that the Zhan Qiao Pai Lingzhi liquor that it is selling are all genuine products and all originated from Changyu Pioneer Wine Corp. including the 1500 disputed cartons.

78 Do you think there is any basis at all to the Defendant's (D4 suit) action that you are selling imitation Zhan Qiao Pai lingzhi liquor?

R: No, there is no basis at all.

[17] As can be seen mention of the 1500 cartons of the alleged counterfeit said Chinese wine is only in the content of the letter tendered in court by the respondents and marked P1 in the supporting affidavit of the respondents which Ngan reads in response to question 75. Responding to question 77 Ngan merely states his understanding of the content of the said letter. Ngan's witness statement makes no mention or reference at all directly or otherwise to any document or transaction relating to the said documents to even suggest that the appellants were aware of their existence. There is therefore no basis for the respondent's belief that the appellants have or had at any time the said documents in their possession, custody or power.

[18] The exercise of the learned judge's discretion was obviously based on the wrong premise that the appellants admitted having the said documents in their possession, custody and power. There is not a shred of evidence adduced to support that. On the contrary, that fact is clearly in dispute as evidenced by the appellants denial in para 3 of their solicitor's response to the respondents notice to produce (see p 379 of the AR 541) and confirmed by Thye Yan Mee's affidavit of 27 October 2000. Paragraph 3 is the reproduced hereunder:

3. Our clients do not have any knowledge nor are privy to the alleged transaction relating to the 1,500 cartons referred to in your Notice To Produce dated 13.7.2000 and your letter dated July 12, 2000. The reference to the said alleged transaction in the said draft witness statement is in response to and with reference to the document at page 292 of the Agreed Bundle of Documents, Vol. 1.

Appellate intervention is accordingly justified and the order made must be and was set aside.

ENCLOSURE 61

[19] Being an application under r 11(1), encl 61 basically rests on the issue of whether the import documents are referred to in the appellants' affidavit of Ngan affirmed 5½ years earlier on 8 February 1995. The appellants'

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response to encl 61 was that they have furnished all the documents pertaining to the importation of the said Chinese wine from 1992 to 1995 in the bundle of documents Vol 2 (BOD 2) and that Ngan's affidavit affirmed on 8 February 1995 did not make reference to any specific documents or dates relating to the import of the said Chinese wine, hence no reference is made to the import documents relating to the alleged counterfeit said Chinese wine which the appellants had neither knowledge nor admitted their existence.

[20] The onus is on the respondents to proof that all the import documents were in the possession, custody or power of the appellants. The respondents contend that BOD 2 did not answer the application as the documents therein mentioned either refer to imports prior to 1994 or imports in November 1995 the latter not even existing when Ngan's affidavit was affirmed. The veracity of the appellant's denial of possession of documents relating to such import must be tested against their previous admission that they did exist. Lack of bona fides was also alleged.

[21] Reference to documents relating to the said Chinese wine at any time being in the appellants possession, custody or power is only found in para 15 of Ngan's affidavit which is reproduced below:

> 15 I further state that the allegation in paragraphs 7, 9 and 10 of Tan's Second Affidavit is mischievous as the Defendant is seeking to procure the Plaintiffs to reveal the identity of the exporters for a collateral purpose, namely, to put pressure upon and victimise the lawful exporters of the 'Zhan Qiao Pai' Special Quality Lingzhi Wine in PRC and Hong Kong. The Plaintiffs will disclose their documents if the Defendant agrees to give an undertaking to this Honourable Court that it will not make use of any information or documents so disclosed for a collateral or improper purpose. The Plaintiffs will, as and when required by this Honourable Court, procure witnesses from PRC and Hong Kong to testify to this at the trial of this action.

[22] As can be seen no reference is made at all to any specific documents nor the dates of those documents. The law requires direct allusion to be made in the affidavit for the documents sought for production before the other party can have the right to discovery — see *Dubai Bank*'s case. There is no reason for the court to doubt the appellants' averment that they have furnished all the import document in their possession and custody in BOD 2 because that is the extent of their admission. The admission in para 15 makes no reference to the import documents pertaining to the alleged counterfeit said Chinese wine because they are not directly alluded to.

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[23] The learned judge therefore erred when he ordered discovery on the premise of acknowledgement that the appellants had in their possession, custody and power the import documents other than those in BOD 2. To grant the order would be oppressive to the appellants. It would also cause prejudice as the task is impossible. Appellate intervention is therefore in order to set aside the order of the High Court.

ORDER 24 RULE 13(1)

[24] There is one other matter which we cannot ignore and leave unsaid because it is fatal to the decision of the learned judge and vitiated the exercise of his discretion. It is this. He apparently misdirected himself in law when he misappreciated the issue before him. In his grounds of decision the learned judge states that the issue for his determination was whether the discovery and production of the documents would fairly dispose of the case, save time of trial and cost of calling witnesses which be answered in the affirmative.

[25] As stated earlier the real issue is compliance with r 13(1) which stipulates that discovery may only be ordered if the court is of opinion that such order is necessary either for disposing fairly of the cause or matter or for saving costs. The test is necessity not fairness and it is for the applicant to satisfy the court, see *Dolling-Baker*'s case and *Ventouris v Mountain.* Because of that erroneous premise the learned judge appears to be more concerned with relevance and fairness and omitted to consider whether and why it was necessary for the order to be made. The respondents also failed to provide any materials to satisfy the court of such necessity.

[26] If necessity is not the prime concern of the court, allowing discovery would tantamount to allowing the respondents to fish for evidence which defeats the propose of the rule by causing the appellants to suffer unfair disadvantage if they fail to comply with an order which is oppressive and incapable of compliance — see *Taylor v Anderton* and *Leslie S Holmes.* To make matters even worse the learned judge even had the respondents' cause of action against the appellants wrong when he states that it is for defamation and slander which is the appellants' counterclaim and subject to their D4 action. This error also renders his finding on relevancy questionable and untenable. Such failure to consider what the law requires him to consider and the misappreciation of fact must vitiate the exercise of the learned judge's discretion and call for appellate intervention.

CONCLUSION

[27] In all the circumstances and for reasons aforesaid we allowed both appeals and set aside the orders of the learned judge with costs to follow the event. Deposits to be refunded.

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[28] The presiding judge of these appeals has since retired. However when the decision was made to allow these appeals we were clear of the reasons. It was just a matter of reducing them in writing which we, the remaining judges have done accordingly.

Appeals allowed with costs.

Reported by Kanesh Sundrum